IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF MWANZA

AT MWANZA

LABOUR REVISION NO. 31 OF 2022

(Originating from Labour Dispute No. CMA/MZ/NYAM/83/2019)

ABT ASSOCIATES INC. TANZANIA OFFICE ..... APPLICANT

VERSUS

AMBROSE ASENGA ..... RESPONDENT

JUDGMENT

20/3/2023 & 8/5/2023

ROBERT, J:-

The applicant, ABT Associates Inc. Tanzania Office, seek an order of this Court revising and setting aside the Award of the Commission for Mediation and Arbitration (CMA) in Labour Dispute No. CMA/MZ/NYA/83/2019. The application is supported by an affidavit sworn by Mr. Mubita Lifwatila, Principal Officer of the applicant.

Briefly, the respondent, Ambrose Asenga was engaged in employment by the applicant on a probationary basis effective on 20th August, 2018 as Technical Specialist/Kagera Senior Regional coordinator. His employment was supposed to be confirmed after a successful six months probationary period. However, due to unsuccessful completion of the probationary period, the applicant, vide a letter dated 28th January, 2019, communicated to the respondent her decision not to confirm his

employment past the six months probationary period. Aggrieved by the termination, the respondent registered his complaint at the CMA alleging breach of contract of employment and prayed that termination be declared unfair and the applicant herein be ordered to pay compensation for breach of contract of employment for 36 months which makes a sum of TZS 176,630,001.48. The CMA delivered its Award in favour of the respondent herein and ordered the applicant to pay the respondent a total of TZS 180,391,558/=. Aggrieved, the applicant preferred this application seeking to revise the CMA decision.

At the request of parties, the application was disposed of by way of written submissions whereby the Applicant's submissions were drawn and filed by Blandina Kihampa, learned counsel whereas Mr. Kassim Said Masimbo, Personal Representative for the respondent, prepared and filed submissions for the respondent.

Submitting in support of this application, Ms. Kihampa started by adopting the contents of the affidavit sworn in support of this application to form part of her submissions. She argued that, the CMA Award is being challenged in this Revision on four main areas. First, that the arbitration proceedings of the CMA are incoherent and do not contain full testimonies of the Applicant's witnesses; secondly, the holding by the CMA that there

was no valid reason for termination (ie. Non confirmation due to absence); thirdly, the holding by the CMA that the procedure adopted was unfair; and finally that, the Respondent was not entitled to the compensation awarded.

Starting with the first issue on the alleged incoherence and illegibility of the CMA proceedings. She submitted that, Rule 32 of the Labour Institutions (Mediation and Arbitration) Rules, 2007 requires the arbitrator to keep a record of the arbitration proceedings with legible handwritten notes or by other means of electronic recording. She argued that, in the present case both handwritten and typed arbitration proceedings found in the CMA records are illegible thus, no clear meaning can be deciphered from the proceedings.

She pointed out that the alleged incoherence is apparent after the opening of the Applicant's case from 25th July, 2019 where two witnesses (both foreigners) testified by English language but is not the case in respect of the Respondent's testimony which was presented in Kiswahili language.

She contended that, the said proceedings do not give a summary of the evidence presented by the Applicant witnesses nor provide the arguments presented by the applicant and are summarized in such an

illegible manner that a person who was absent in the arbitration proceedings would not be able to make out the gist or meaning of the testimonies.

As a result, she observed that, this Court is being denied the right to scrutinize a legible and coherent record of the arbitration proceedings in order to reach to a judicious decision. Further to that, the said shortcoming on the arbitration proceedings have denied the applicant his right to be heard because what the applicant presented through the two witnesses has not been captured well such that it amounts to the applicant failing to mount a defence against the claims presented by the Respondent.

Therefore, she implored the Court to uphold this ground of revision and declare by virtue of Rule 32 (6) of the Labour Institutions (Mediation and Arbitration) Rules 2007 that, both the handwritten and the certified transcript of the record of arbitration proceedings are incorrect for being illegible, incoherent and containing incomplete testimonies of the Applicant's witnesses.

In response to this ground, counsel for the respondent submitted that the applicant's submissions on this ground are mere misconceptions of the law based on speculation of facts. He argued that the applicant is

trying to employ legal technicalities for purposes of delaying justice to the detriment of the respondent. He argued that the Arbitrator had fully recorded testimonies and every piece of evidence adduced at the CMA. He contended that in recording proceedings, the CMA considers the framed issues thus, the trial Arbitrator complied with the provision of rule 32(3) of the Labour Institutions (Mediation and Arbitration) Rules, G.N. No. 64 of 2007 by summarizing the evidence and arguments submitted by the parties and recorded legibly all key issues relating to the dispute.

He submitted that although the applicant pointed out what transpired at the CMA from 25th July, 2019 as being incoherent to what is recorded in proceedings, she did not vindicate which words or testimonies were skipped and illegibly recorded. Therefore, he implored the Court not to allow the counsel for the applicant's inference that the Hon. Arbitrator does not understand English language as the two witnesses whose testimonies are alleged to have been recorded incoherently were foreigners.

He also opposed the argument that this Court has been denied the right to scrutinize legible and coherent records of the arbitration proceedings where the same records were not amplified or mentioned even in a single word. He also argued that the said allegations cannot be

equaled to denial of the right to be heard on the part of the applicant since all parties to this dispute were heard and their testimonies were recorded.

Rejoining on this ground, counsel for the applicant submitted that, incoherence of proceedings can be seen from the handwritten noted and typed proceedings while illegibility can be seen in the handwritten notes. However, she indicated that this this ground is not aimed at incorporating new evidence or facts but rather to alert the court on the shortcomings of the record so as to ensure that the shortcomings are dealt with in accordance with the law and justice prevails.

In light of the conflicting submissions made by the parties in relation to this matter, it is imperative for this Court to find a resolution on this issue prior to any consideration of other grounds

This Court is aware that record of arbitration proceedings is regulated under rule 32 of G.N. No. 64 of 2007. As rightly said by the counsel for the applicant, Rule 32(1) requires an arbitrator to keep a record of the arbitration proceedings with legible hand-written notes or by other means of electronic recording. In doing so, the arbitrator is required to summarize the evidence and arguments submitted by the parties and record all key issues relating to the dispute under rule 32(3).

I wish to observe here that, court proceedings are a fundamental aspect of the decision making process, it is essential that they are conducted in a clear and coherent manner to ensure that all parties involved can understand the issues at hand and have the opportunity to present their case effectively. Incoherent or illegible proceedings makes it difficult for the Court and parties involved to understand the evidence presented or the reasoning behind the decision and for the appellate courts to review the case and this may result in an incorrect decision. It is therefore crucial for the court or arbitration proceedings to be conducted in a clear and organized manner, with accurate records maintained, to ensure that the court can make an informed and just decision.

However, in the present case, as rightly argued by the respondent, the applicant has not presented any evidence to support her claim on incoherence or illegibility of proceedings. Simply alleging that the arbitration or lower court proceedings were incoherent and illegible may not be enough to convince an appellate court to overturn the lower court's decision. The alleging party must present compelling evidence that supports their claim and demonstrates that the lower court proceedings were fundamentally flawed. For example, the party may present affidavits

from individuals who were present at the lower court proceedings and can attest to that effect. The affidavit can be used to support the party's claim. Therefore, since the applicant did not produce any evidence to support her claim, I find no merit in this ground.

I will now proceed to consider the remaining grounds jointly as they pertain to overlapping issues.

The second ground faults the impugned Arbitral Award for holding that there was no valid reason for termination. Submitting on this ground, counsel for the applicant started by observing that arbitration proceedings do not give a correct account of the testimonies of the Applicant's witnesses therefore, the evidence in support of the reason for termination cannot be deciphered from the proceedings. Nevertheless, she argued that, the Applicant established that the Respondent did not pass the practical interview (probation). He was under a six months probationary period when he absconded from his duty during the malaria spraying campaign in Ngara. She maintained that, the respondent's absence regardless of whether it was less than five days was grave considering his role in the spraying campaign and project in general.

On his part, counsel for the respondent argued that the contract between the applicant and respondent was for indefinite period therefore

to terminate this kind of agreement the employer was supposed to have fair and valid reasons and to adhere to the prescribed procedures before terminating the respective contract of employment. He contended that the termination letter (exhibit C1) reveals that the contract was terminated on "failure to probation not on ground of misconduct". Hence, he maintained that there was no valid reasons for termination demonstrated by the applicant.

Rejoining on this ground, counsel for the applicant submitted that, the respondent did not pass the practical interview that is probation. Consequently, the indefinite contract he would have enjoyed was never confirmed and due to the non – confirmation, the status of the respondent never changed from that of a probationary employee to an employee. She contended that during probation both the probationer and the employer are required to test the suitability to each other, if either party finds that there are issues then the employment contract can be terminated by non – confirmation. The applicant found the suitability of the respondent lacking because he absconded from his duty station without any information to his superiors and without permission at a critical time of the spraying campaign. This was worsened by the fact that he was Technical Specialist/Kagera Senior Regional Coordinator.

On the third ground the applicant faulted the CMA for holding that the termination was not procedurally fair. Apart from the argument that the arbitration proceedings do not give a clear account of the procedure adopted by the Applicant, counsel for the applicant submitted that, DW1 testified before the CMA that after receiving phone calls regarding the absence of the respondent he sent an email to the respondent asking him to give an explanation regarding his absence. She argued that, in response, the Respondent acknowledged that he was absent without prior approval. Following the response by the Respondent, DW1 informed the Respondent that the matter will be taken up by Human Resource office. The email correspondences were admitted as Exhibit D1 collectively.

She argued further that, DW1 testified further that after the email correspondence a teleconference was arranged between DW1, the Respondent, two of the Applicant's staff who were also based in Kagera – Bukoba together with the Respondent and two other staff from the applicant's home office in the USA where the Respondent admitted that he was wrong. After this meeting, the Respondent was given a letter of non-confirmation. Hence, she submitted that due process was followed and the Respondent was adequately heard on the matter.

Without prejudice to the submissions above, counsel for the applicant submitted that, the Respondent herein was not yet an employee of the Applicant but a probationer as his employment was yet to be confirmed. She referred the Court to the case of **Stella Temu vs Tanzania Revenue Authority,** Civil Appeal No. 72 of 2002, CAT (Unreported) and **David Nzaligo vs National Microfinance Bank PLC,** Civil Appeal No. 61 of 2016, CAT (Unreported) where the Court of Appeal held that in the absence of confirmation of employment after probation one is not an employee.

In view of the position above, the learned counsel submitted that, the Respondent was not entitled to compensation awarded by the CMA because he was not an employee of the applicant. She argued that granting compensation to the respondent under Section 40 (1)(c) of the Employment and Labour Relations Act was wrong since section 35 of the Act is categorical that;

> *"The provisions of this Sub – Part shall not apply to an employee with less than 6 moth's employment with the same employer, whether under one or more contracts".*

Further to that, the learned counsel made reference to page 21 and 22 of the decision in the case of **David Nzaligo vs National Microfinance Bank Plc** (supra) where the Court of Appeal held that:

> *"Section 35 of ELRA provides that the provision of Part III Subpart E shall not apply to an employee with less than 6 moths employment with the same employer, whether under one or more contract, means that a worker with less than 6 months of employment may not bring an unfair termination claim against the employee, as held by the judge..."*

In view of the stated position above, she observed that although section 35 of the ELRA addresses the period of employment and not the status of employment, the fact that a probationer is under assessment and valuation can in no way lead to circumstances that can be termed unfair termination. She maintained that, when assessing this provision it is a provision that envisages an employee fully recognized by an employer and not a probationer.

Therefore, she urged the court to apply the above holding in the present application. That is, relief cannot be based on employment contract whose conditions had not yet been fulfilled. The Respondent was not an employee but a probationer whose employment was not confirmed.

Replying to this ground, counsel for the respondent submitted that the procedure of termination of the employee under probation are

enshrined in rule 10(1)-(9) of the Employment and Labour Relations (Code of Good Practice) Rules, G.N. 42 OF 2007. He argued that complying with the requirements under the cited rule was insisted in the case of **Agnes B. Buhere vs UTT Microfinance PLC,** Revision No. 459 of 2015, HCT, which decided that:-

> "Before terminating or resorting to termination of the probationer or extending the probationary period, the employer must invite the probationer to make representations and consider them. Such representation may also be made on behalf of the probationer by a trade union representative or co-employee."

He argued further that, although the applicant tries to justify that he followed fair procedures towards termination of the contract by pointing out conversations via phone calls and e-mails, the applicant failed to prove and convince the arbitrator during proceedings as there were neither phone numbers nor names of people involved were demonstrated during the hearing proceedings. Futher to that, the phone calls and email conversation admitted before the CMA were contrary to the conditions set forth under the provisions of section 64A of the Evidence Act, and section 18 of the Electronic Transactions Act, No. 13 of 2015, hence they couldn't be used to validate the applicant's contention. To support his argument, he referred the Court to the case of Christina **Thomas vs Joyce Justo Shimba,** PC Civil Appeal No. 84 of 2020, HCT at Mwanza (unreported).

Based on the argument made, he maintained that it was right and fair for the arbitrator to ignore such illegally admitted exhibit D1 as evidence in support of the applicant's contention without conforming with the conditions set under the law.

The learned counsel continued to argue that, during the CMA hearing the respondent was absent for only one day, that is, Monday 13th November, 2018 since Saturday and Sunday 11th – 12th of November, 2018 were not working days according to the respondent's policy the same respondent was not afforded the right to be heard out that challenged exhibit D1 since the respondent did not attend work for one day that Monday 13th November, 2018 and for the first time. This could not justify direct termination of the employment contract since it is a well-established principle of law that termination of employment on the ground of absenteeism must be absence from work for more than five (5) working days. To support his argument he referred the Court to the decision of the Court of Appeal in the case of **Constantine Victor John vs Muhimbili National Hospital**, Civil Application No. 188/01 of 2021, CAT (unreported) where the Court held that:

> *".....in this regard, being guided by the cited authority and having in mind rule 9 item 1 of the Code of Good Practice Rules, the applicant's employment ought not have been*

terminated since his absence from work without permission or without acceptable reason was not more than five working days..."

In addition to the reasons above, counsel for respondent submitted that, the respondent proved through exhibit C3 that he was double jeopardized by being penalized twice for the same misconduct by deducting his December, 2018 monthly salary the total amount of TZS 452,000/= the facts which were admitted by the applicant's witness during CMA hearing which is contrary to the principle of natural justice.

Responding to the argument that, the respondent was not yet an employee of the applicant but a probationer, he submitted that this is a misconception of the law because non-confirmation of the contract of employment pending probationary period does not warrant illegal termination of the contract of employment without following the requisite procedures under Rule 10(1)-(9) of the G.N, 42 of 2007.

In her rejoinder submissions counsel for the applicant maintained that although absenteeism for more than five days is a serious misconduct under the law, abscondment in this case was a test of whether the respondent was compatible for the role of Technical Specialist/Kagera Senior Regional Coordinator hence it was treated as a reason for non – confirmation as opposed to it being dealt with as a misconduct.

The last ground sought to challenge compensation awarded to the respondent. Counsel for the applicant argued that assuming the Respondent was entitled to compensation under the Act, the amount awarded by the CMA is unjustified. She argued that the Arbitrator had not fixed reasons for the awarded compensation as required by the law. She argued that, the law is settled that any Award beyond the minimum of 12 months salaries must be with reason and justification. The Arbitrator awarded 36 months 'salaries without affixing any reason and giving any justification as can be seen at page 10 to 11 of the Award. To support her argument, she made reference to the case of **International Medical and Technological University vs Eliwangu Ngowi,** Revision No. 54 of 2008, HCT (Unreported) where the Court held that:

> *"it is a settled principle of law that damages should not be anticipator i.e awarded for future events which may happen or not...*
>
> *The Law provides for an award of no less than twelve month. This is the only certain figured mentioned by the law. Any amount above that must be justified by the facts of the case".*

She concluded her submissions by praying that the Revision be allowed and the proceedings an Award of the CMA be quashed and set aside.

In response, with respect to the argument that since the respondent is not an employee he was not entitled to the compensation awarded by the CMA because he is not covered by virtue of section 35 of the Employment and Labour Relations Act, counsel for the respondent argued that the respondent's claims in the CMA Form No.1 was not for unfair termination but unlawful termination which amounts to unfair labour practice or breach of contract of employment. Hence, he admitted that the respondent was not covered by the provisions of section 35 of the Act but clarified that his claims were not based on section 35 of the Employment and Labour Relations Act. He refereed the Court to the case of **Agness B. Buhere vs UTT Microfinance PLC** Revision No. 459 of 2015, HC Labour Division at DSM (unreported) where the Court decided that:

> *"while the termination of probationary employee is excluded from the ambit of section 35 of the Employment and Labour Relations Act, No. 6 of 2004 it is likely that forms of conduct prescribed by the Code Guidelines will, in the absence of justification be regarded as unfair labour practice in relation to probation. An employee is entitled to compensation or and reinstatement par excellence"*

In view of the position above, he submitted that, there is a difference between the remedy of compensation for breach of contract of

employment which was awarded to the respondent and those which falls under section 35 of the Employment and Labour Relations Act.

Responding to the issue regarding justification of 36 months compensation awarded by the CMA, the learned counsel submitted that, the respondent's claims were prayed in CMA Form No. 1 which included compensation for 36 months and subsistence allowance until the day of payment of repatriation costs. He argued that, the granted amount was reasonable since there is no limit of compensation upward and the said amount is in conformity with the law as decided in the cases of **Sodetra (SPRL) vs Njellu Mezza & another,** Revision No. 207 of 2008, HC Labour Division at Dsm (unreported) and the Court of Appeal decision in the case of Veneranda Maro & another vs Arusha International Conference Centre, Civil Appeal No. 322 of 2022, CAT at Arusha (unreported) where the CAT borrowed a leaf from the South African case of VIUOEN VS Nketoana Local Municipality (2003)24 ID 437 where it was stated that:

> *"... compensation is not an award of damages in the contractual or delictual sense. It includes a penal element against the employer for failing to get the procedure right, as well as an element of solace to the employee, in the sense that the employee has lost the right to be given a procedure"*

He argued that, during trial the respondent proved on balance of probability through exhibits tendered to the CMA that there was ill intent towards breach of contract of employment on the part of the applicant thus respondent is entitled to 36 months compensation to the tune of TZS 176,639/= out of the 60 months of the project period and further that, the respondent was recruited at Moshi Municipal Kilimanjaro region and he was terminated at Bukoba, Kagera region therefore he was supposed to be repatriated to Moshi under section 43(2) of the ELRA. He argued that evidence indicated that repatriation payment was delayed for 23 days from 28th January to 18th February, 2019 therefore the respondent deserved to be paid subsistence allowance for 23 days to the sum of TZS 3,761,558/=. To support his argument he referred the Court to the case of Gasper Peter vs Mtwara Urban Water Supply Authority (MTUWASA) Civil Appeal No. 35 of 2017, CAT at Mtwara (unreported).

Having examined evidence adduced by the parties at the CMA as indicated in the proceedings of the CMA and considered submissions of both parties in this application, it is undisputed that the respondent was engaged in an indefinite employment agreement by the applicant effective on 20th August, 2018 through an agreement dated 8th August, 2018. The agreement included an initial trial period of six (6) months. It is also

undisputed that the respondent's employment was terminated on 28th January, 2019 through a letter which informed him that the applicant had decided not to confirm his employment past his six-month probationary period. That is to say, he was terminated while under probation.

It was submitted by Mr. Masimbo, the respondent's Personal representative that the respondent's complaint at the CMA was that Rule 10 of the GN No. 42 of 2007 regarding fairness of termination of a probationer was not complied with. Records indicate that, the respondent filled CMA F.1 and ticked in the box under item 3 indicating the nature of the dispute to be breach of contract. He did not fill part B of CMA F1 which deals with termination of employment only which I consider to be proper because as a probationary employee he was excluded from contesting unfair termination of employment under section 35 of the Employment and Labour Relations Act.

In his testimony, the respondent (PW1) informed the tribunal that he was terminated on 28/1/2019 and the reasons for his termination were not clear as the termination letter (exhibit C1) did not indicate the reason for termination. He also testified that termination procedures were not followed, he was not given a charge sheet or called in disciplinary committee. From the evidence adduced by the respondent (PW1) it

appears to this Court that the respondent did not testify much in relation to non-compliance with Rule 10 of the G.N. 42 of 2007.

Nevertheless, the CMA rightly dealt with the matter as a dispute on unfair labour practice relating to probation and made findings that the applicant as an employer failed to comply with rule 10(7) and (9) of the G.N. 42 of 2007 for failure to give the respondent a chance to defend for his absenteeism or to explain on his working capacity during the probation period.

According to the letter of termination, the respondent was terminated due to failure on probation not on ground of misconduct. However, the applicant's witness Mubita Lifwatila (DW1) testified at the CMA that they decided not to extend the respondent's probation because of an incident which happened in Bukoba where he disappeared from duty when they were in a spraying campaign and they learned from this that he was not a good person for them. In cross-examination he stated that the reason for termination was because he was not confirmed. In her submissions, counsel for the applicant informed this Court that, the applicant's abscondment from his duty station was treated as a reason for non-confirmation as opposed to it being dealt with as a misconduct.

Be as it may, if an employee under probation is terminated due to failure on probation, as indicated in the letter of termination by the employer, the law establishes specific guidelines pertaining to the termination of a probationary employee under rule 10(1) – (9) of the G.N. No. 42 of 2007. From the evidence in record there is no indication that the applicant complied with the guidelines provided under the cited Rule before terminating the respondent as a probationary employee. In view of that, I agree with the findings of the CMA that the applicant violated the provisions of rule 10(7) and (9) of the G.N. No. 42 of 2007 which requires that, if the employee is not performing to standard or may not be suitable for the position, the employer should notify the employee of that concern and give him an opportunity to respond or improve. Sub-rule (9) allows a probationary employee to be represented in this process by a fellow employee or union representative. There is no proof that the applicant complied with the said requirements. The applicant's failure to follow the procedure laid down in the cited Rules before terminating the probationary employee was a conduct of unfair labour practices in relation to probation (See **Agness B. Ruhere vs UTT Micro Finance PLC** (supra)).

With that finding comes the question of remedies raised in the second ground of appeal. The applicant submitted that since the respondent was terminated during probation before termination, the CMA was wrong to grant compensation on the basis of reliefs provided under sub part E, section 40(1)(c) of the Employment and Labour Relations Act because under section 35 of the Act, a probationary employee is excluded from reliefs granted under sub part E of the Employment and Labour Relations Act.

Section 35 of the Employment and Labour Relations Act provides that:

> *"35. The provisions of this Sub-Part shall not apply to an employee with less than 6 months' employment with the same employer, whether under one or more contracts."*

While Mr. Masimbo maintained that the respondent was not awarded damages which falls under section 35 of the Employment and Labour Relations Act, this Court is aware that sub-part E of the Employment and Labour Relations Act covers the provisions of section 35, 36, 37, 38, 39 and 40 of the Act. At page 10 of the impugned award of the CMA, when granting compensation for breach of contract, the Arbitrator stated that:

> *"Therefore, the respondent is ordered to pay the complainant compensation for 36 months' salaries for unfair breach of contract/unfair labour practice the sum of Tshs. 176,630,000/=, as per section 40(1)(c)*

of the ELRA No. 6/2204 (sic) read together with rule32(5)(a),(b),(c) and (d) of the G.N. No. 67/2007..."

Since the respondent was a probationary employee with less than six months' employment, he was not entitled to enjoy the rights and benefits enjoyed by a confirmed employee (see **David Nzaligo vs National Microfinance Bank PLC** (supra) at page 22. It follows therefore that, the CMA erred in awarding the respondent reliefs under sub-part E of the Employment and Labour Relations Act because he was excluded from such reliefs under section 35 of the Act. That said, I proceed to quash and set aside the Award of the CMA.

As for unfair labour practices conduct by the employer, I find it right that the employee is entitled to compensation (See **Agness B. Ruhere vs UTT Micro Finance PLC** (supra). However, as rightly argued by the applicant, I find the compensation of 36 months salaries claimed by an employee who is terminated for failure to meet the expectations of the employer during probationary time to be excessive. This can also impose a significant financial burden on the employer. I order the employer to pay the respondent compensation for six (6) months salaries for unfair labour practices relating to probation.

The application for revision is allowed to that extent. Each party to bear its costs.

K.N. ROBERT
JUDGE
8/5/2023